No. 80-1882

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IN THE

Supreme Court of the United States

OCTOBER TERM 1980

CHARLES CHAPMAN, *et al.*,

Petitioners,

v.

THE DOW CHEMICAL COMPANY,
DIAMOND SHAMROCK CORPORATION,
MONSANTO COMPANY,
THOMPSON-HAYWARD CHEMICAL COMPANY,
and HERCULES INCORPORATED,

Respondents.

(IN RE "AGENT ORANGE" PRODUCT
LIABILITY LITIGATION)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

CONSOLIDATED BRIEF IN OPPOSITION

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QUESTION PRESENTED

May a district court fashion a federal common law of products liability to confer federal question jurisdiction pursuant to 28 U.S.C. § 1331(a) over actions for personal injuries by former servicemen and members of their families against private corporations, where the rights and duties of the United States are not at issue and will not be directly affected and where no federal policy will be frustrated by the application of diverse state law rules?

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CONSOLIDATED BRIEF IN OPPOSITION

Respondents Diamond Shamrock Corporation, Monsanto Company, Thompson-Hayward Chemical Company, and Hercules Incorporated[1] submit this brief in opposition to peti-

[1] Respondents' statement pursuant to Supreme Court Rule 28.1 may be found in the Appendix.

tioners' request that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Second Circuit entered November 24, 1980 in *In re "Agent Orange" Product Liability Litigation*, 635 F.2d 987 (2d Cir. 1980).[2]

STATUTORY PROVISION INVOLVED

The statutory provision quoted by petitioners, 28 U.S.C. § 1331(a), has been amended. It now provides:

> The district court shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

Pursuant to Section 4 of the Federal Question Jurisdictional Amendments Act of 1980, the amendment was made applicable to pending cases. Pub. L. No. 96-486, § 4, 94 Stat. 2370 (1980).

COUNTERSTATEMENT OF THE CASE

This litigation involves the continuing controversy over the alleged health effects of "Agent Orange"[3] and related

[2] The only action before this Court is *Chapman* v. *Dow Chemical Co.*, 79 C 1195, which the District Court has designated as the "lead action" in the "Agent Orange" Product Liability Litigation, MDL No. 381. Following the Court of Appeals decision, the District Court retained federal jurisdiction over *Chapman* based on diversity of citizenship, 28 U.S.C. § 1332. *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 782 n. 30, 786 (E.D.N.Y. 1980). Thus, petitioners incorrectly contend that the creation of federal common law jurisdiction is necessary to ensure that these cases will be decided in the "apolitical atmosphere of the federal courts" (Petition at 4). *See Martin* v. *Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 347 (1816) (discussing the historical bases of diversity jurisdiction, including the impartiality of the federal forum).

[3] "Agent Orange" was an approximately 50-50 mixture of the n-butyl esters of 2,4-D (2,4-dichlorophenoxyacetic acid) and 2,4,5-T (2,4,5-tricholorophenoxyacetic acid). The name "Agent Orange" derives from the orange band painted on the containers in which the herbicide was transported. *See "Herbicide Agent Orange," Hearing*

(Footnote continued)

defoliants that were used by the United States military in Vietnam from 1962 to 1971. The defendants-respondents are companies that manufactured Agent Orange for use by the military.

The controversy surrounding the health effects of Agent Orange concerns the alleged presence of minute quantities of 2,3,7,8-tetrachlorodibenzo-*p*-dioxin ("TCDD") in the herbicide. Throughout this case, petitioners have contended that there is a causal connection between exposure to Agent Orange and their claimed illnesses—a contention that respondents continue to deny vigorously. Petitioners base their claims on traditional state law concepts of negligence, breach of warranty, and strict liability in tort.

The specific issue here, however, is jurisdictional[4]—may a district court displace a state's substantive products liability law by grounding jurisdiction under § 1331(a) upon federal common law, where plaintiffs are private citizens who seek compensation against private corporations for injuries allegedly sustained while on military duty. In reversing the District Court, the Court of Appeals correctly held that to displace a state's substantive law of products liability absent an identifiable conflict with either the United States Constitution or federal legislation would destroy fundamental concepts of federalism and separation of powers.

SUMMARY OF ARGUMENT

The petition before this Court should be denied because the case does not qualify for the creation of federal common law under either of the two theories developed by this Court for

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(Footnote continued)
Before the Subcommittee on Medical Facilities and Benefits of the Committee on Veterans Affairs of the House of Representatives, 95th Cong., 2d Sess. at 4 (1978). Both 2,4-D and 2,4,5-T have been used domestically in the United States since the 1940's. *See* R. BOVEY & A. YOUNG, THE SCIENCE OF 2,4,5-T AND ASSOCIATED PHENOXY HERBICIDES 1-5 (1980).

[4] For that reason, respondents will not discuss petitioners' request for the creation of a trust fund out of the earnings of the respondents. Although that issue was before the Court of Appeals, the court declined to review the ruling of the District Court. *In re "Agent Orange" Product Liability Litigation*, 635 F. 2d at 992 n. 10.

evaluating such requests. This is not a case where the rights and duties of the United States are at issue. Nor is this a case where the application of state law would conflict with a specific constitutional guarantee or a federal policy embodied in a federal statutory scheme. Further, the decision below accords with decisions in sister circuits. Finally, the federal courthouse door has not been closed to the petitioners, since an alternative jurisdictional basis has been recognized by the District Court.

ARGUMENT: REASONS FOR DENYING THE WRIT

The decision of the Court of Appeals accords with decisions of this Court and does not conflict with any decision of any other court. Further review is, therefore, unwarranted.

I.

The Court of Appeals Decision is Correct

After *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938), federal courts may devise common law rules only in areas governed by the Constitution or a valid congressional enactment. As Mr. Justice Jackson noted, concurring in *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 447, 472 (1942), "Federal common law implements the federal Constitution and statutes, and is conditioned by them."

At the same time, federal courts exercising this limited power to make law must be cautious not to infringe on the legislative power that has been reserved to the Congress by Article I of the Constitution. This basic principle was restated this Term in *City of Milwaukee* v. *Illinois,* ____ U.S. ____, 49 U.S.L.W. 4445, 4447 (April 28, 1981):

> The enactment of a federal rule in an area of national concern, and the decision whether to displace state law in doing so, is generally made not by the federal judiciary, purposefully insulated from democratic pressures, but by the people through their elected representatives in Congress.

Accord, Northwest Airlines, Inc. v. *Transport Workers Union of America*, ____ U.S. ____, 49 U.S.L.W. 4383, 4388 (April 20, 1981); *Miree* v. *DeKalb County*, 433 U.S. 25, 32 (1977); *United States* v. *Standard Oil Co. of California*, 332 U.S. 301, 316 (1947).

The cases that have applied federal common law reflect two general theories. The first line derives from *Clearfield Trust Co.* v. *United States*, 318 U.S. 363 (1943), and is composed of those cases where the rights and duties of the United States itself are directly at issue. *See, e.g., United States* v. *Kimbell Foods, Inc.*, 440 U.S. 715 (1979); *United States* v. *Standard Oil Co. of California, supra.* In those cases, a federal common law rule was devised to prevent the Government from being burdened by the uncertainty of differing state rules.

The second theory concerns the application of federal common law to controversies between private parties. Absent a manifest congressional intent to preempt the area involved for federal authority, federal common law is applied in those circumstances only upon an express demonstration that the application of state law will actually frustrate a federal interest articulated in the Constitution or by Congress. *See City of Milwaukee* v. *Illinois*, ____ U.S. at ____, 49 U.S.L.W. at 4447-48; *Miree* v. *DeKalb County*, 433 U.S. at 31; *Wallis* v. *Pan American Petroleum Corp.*, 384 U.S. 63, 68 (1966).[5]

It is apparent that petitioners have failed to comprehend the essentially private character of this lawsuit and, in so doing, have erroneously relied on the first theory to support the claim of federal question jurisdiction. As the Court of Appeals correctly reasoned, this first theory is inapplicable in the present case because, unlike the situations in *Clearfield Trust Co.* v. *United States, supra, United States* v. *Standard Oil Co. of*

[5] A third area where federal common law ordinarily controls is in controversies between interstate governmental entities. *E.g., Northwest Airlines, Inc.* v. *Transport Workers Union of America*, ____ U.S. at ____, 49 U.S.L.W. at 4388; *Illinois* v. *City of Milwaukee*, 406 U.S. 91 (1972). Petitioners do not rely on any cases decided under this theory.

California, supra, and *United States* v. *Kimbell Foods, Inc., supra,* the rights and duties of the United States will not be directly affected by the outcome of this action. *See also Bank of America National Trust & Savings Ass'n* v. *Parnell,* 352 U.S. 29, 33 (1956) ("[t]he present litigation is purely between private parties and does not touch the rights and duties of the United States").[6]

Moreover, petitioners have ignored the admonition repeatedly expressed by this Court, and relied upon by the Court of Appeals, which governs cases where the rights and duties of the United States are not at issue:

> In deciding whether rules of federal common law should be fashioned, normally the guiding principle is that a *significant conflict between some federal policy or interest and the use of state law in the premises must first be specifically shown.*

Miree v. *DeKalb County,* 433 U.S. at 31 (quoting *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. at 68) (emphasis in original); *accord, City of Milwaukee* v. *Illinois,* ___ U.S. at ___, 49 U.S.L.W. at 4448.

Petitioners have failed to demonstrate how the application of state law in this case would conflict with a specific federal policy. The petition's "theory" for divining federal common law rests exclusively upon the shibboleth of uniformity. For several reasons, however, that reliance is misplaced.

Whatever validity an argument in favor of a uniform federal rule may have in situations affecting the Government's legal rights and duties, such a rationale loses force when the litigation is between private parties. As the Court of Appeals observed:

> The fact that application of state law may produce a variety of results is of no moment. It is in the nature of a

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[6] This Court in *Parnell* deemed the federal interest too "speculative" and "remote" to justify the creation of federal common law. 352 U.S. at 33.

> federal system that different states will apply different rules of law, based on their individual perceptions of what is in the best interests of their citizens. That alone is not grounds in private litigation for judicially creating an overriding federal law.

635 F.2d at 994. *See Miree* v. *DeKalb County,* 433 U.S. at 28-29.

In addition, the uniformity argument propounded by petitioners ignores decisions of this Court permitting identifiable federal interests to be subject to diverse state law rules. For example, federal statutory interstices have been filled in by reference to state law. *See, e.g., Burks* v. *Lasker,* 441 U.S. 471 (1979); *De Sylva* v. *Ballentine,* 351 U.S. 570 (1956). These decisions, besides demonstrating dissatisfaction with the "uniformity for uniformity's sake" argument, reflect a reluctance to disregard a relatively established area of state law in favor of a nebulous federal standard. As was observed in *Burks* v. *Lasker, supra,* "Congress has never indicated that the entire corpus of state corporation law is to be replaced simply because a plaintiff's cause of action is based upon a federal statute." *Id.* at 478. Likewise, state law is particularly suited to resolve the Agent Orange litigation, since the bulk of products liability law has been developed in the state courts. *See generally* Note, *Adopting State Law as the Federal Rule of Decision: A Proposed Test,* 43 U. CHI L. REV. 823 (1976).

Indeed, recent state legislative activity compellingly demonstrates that the states have an interest in the issues to be determined in the Agent Orange litigation.[7] The various state

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[7] As examples, the following states, among several others, have expressed an interest through their legislatures in the Agent Orange controversy.

In Illinois, the state where the petitioners' complaint was filed, a bill has been introduced in the State Senate to establish a state commission to study the possible effects of Agent Orange on Illinois Vietnam veterans. *Highland Park Life,* February 7, 1980, at 10.

In New Jersey, a similar bill has actually been passed into law. It establishes a seven-person commission to study these possible effects. *Los Angeles Times,* February 24, 1980, part 1, at 2.

(Footnote continued)

legislative proposals demonstrate that veterans have resorted to the local political process to redress their grievances. In such circumstances the federal courts, absent congressional action, must be especially careful to respect the basic concepts of federalism.

The federal interest most strenuously advanced by petitioners is the interest of veterans in having their claims adjudicated under identical legal principles. Petitioners, however, have failed to demonstrate how the application of state tort law, and its possibly disuniform treatment, would conflict with a federal policy. The rights of the United States are not at issue, nor is a federal administrative scheme placed in jeopardy by possibly conflicting state law determinations. Uniformity is thus an illusory federal interest here, and an inappropriate basis for federal common law jurisdiction.

The various federal statutes cited by petitioners plainly demonstrate a measure of federal concern for veterans. But federal legislation has demonstrated similar concern for numerous other constituencies, including the elderly and indigent. It would be equally incorrect to claim that because of such legislation, federal common law should control the tort claims of any of those constituencies.

(Footnote continued)

In Wisconsin, the state legislature's Finance Committee has approved a budget review bill directing the State Health and Social Services Department to prepare a plan to assist certain veterans who believe they have suffered side-effects as a result of exposure to Agent Orange. *Milwaukee Journal*, March 9, 1980, part 1, at 14.

In New York—the forum for this multi-district litigation—a bipartisan bill has been introduced in the state legislature to allow New York veterans to sue in state court despite the normally applicable statute of limitations. Under the bill, the statute would start running either from the date of discovery of the exposure or from the date of discovery of facts which would lead to such discovery, whichever is sooner. *Newsday*, April 1, 1981, at 23. The State Assembly has passed this bill. *Newsday*, May 11, 1981, at 12.

In Texas, a bill has been introduced that would require the State Attorney General to assist veterans making Agent Orange claims in lawsuits against the manufacturers. This bill would also require the Texas Department of Health to assist veterans allegedly having medical problems related to Agent Orange. *Dallas Times Herald*, April 7, 1981, at 4A.

None of the various federal statutes cited by petitioners establishes a scheme for awarding benefits to veterans that would in any way be affected by the application of state law to petitioners' claims. Significantly, those statutes do *not* provide a tort remedy for injuries sustained while in the armed forces.[8] Thus, even if veterans eventually receive some sort of compensation under a federal scheme, the availability of a state tort remedy will not conflict with that program but instead would result in an additional benefit.

II.

The Court of Appeals Decision Does Not Conflict with the Decision of Any Other Court

The lower federal courts have routinely considered requests for the creation of federal common law with restraint. *See, e.g., Boyster* v. *Royden,* 628 F.2d 1121 (8th Cir. 1980). Significantly, the federal courts have long applied state law to claims by servicemen against manufacturers who allegedly supplied defective products to the military. *See, e.g., Foster* v. *Day & Zimmermann, Inc.,* 502 F.2d 867 (8th Cir. 1974); *Whitaker* v. *Harvell-Kilgore Corp.,* 418 F.2d 1010 (5th Cir. 1969); *Boeing Airplane Co.* v. *Brown,* 291 F.2d 310 (9th Cir. 1961). Indeed, state law and state choice of law rules have been regularly applied to servicemen's claims involving injuries sustained abroad, including claims arising in Southeast Asia. *See, e.g., Challoner* v. *Day & Zimmermann, Inc.,* 546 F.2d 26 (5th Cir. 1977), *on remand from* 423 U.S. 3 (1975); *Melton* v. *Borg-Warner Corp.,* 467 F. Supp. 983 (W.D. Tex. 1979).

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[8] The absence of conflict with a federal policy at this point in time is clearly seen by reference to the numerous legislative proposals currently before Congress on the subject of Agent Orange. A recent example of action taken on these proposals was the approval by the House Veterans Affairs Committee of a bill directing the Veterans Administration to give priority medical treatment to veterans who believe their ailments were caused by exposure to Agent Orange. *New York Times,* May 13, 1981, at A18. To create federal common law in this case would not be an act of interstitial lawmaking but rather would be judicial legislation before Congress has had a chance to act.

Petitioners simplistically argue that review is necessary to correct the "serious error" that "federal prisoners have more rights than United States soldiers." (Petition at 9.) This is a reference to the decision by the Court of Appeals for the Second Circuit in *Owens* v. *Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied*, 444 U.S. 980 (1979), which contains language suggesting that certain claims brought by federal prisoners should be governed by federal common law standards. The *Owens* citation is presumably a strained attempt to uncover a conflict among the circuits. Of course, no such conflict could have been created in this case since *Owens* itself is a Second Circuit decision. That court, moreover, seemed to limit *Owens* to its particular facts, in which the plaintiff prisoner sued as a third-party beneficiary to a contract between the federal and county governments. *See also Verlinden B.V.* v. *Central Bank of Nigeria*, ___ F.2d ___ (No. 80-7413, 2d Cir. April 16, 1981).

III.

No Equitable Consideration Compels Creation of Federal Common Law Jurisdiction

Petitioners are also incorrect in asserting that "the ultimate effect of the ruling of [the Court of Appeals] is to close and lock the doors to the courthouses for all time to more than 600,000 veterans . . . ." (Petition at 9.) The decision accomplishes no such result. Presently, petitioners are in court—federal court—by virtue of the District Court's ruling premising jurisdiction upon diversity of citizenship, 28 U.S.C. § 1332. *In re "Agent Orange" Product Liability Litigation*, 506 F. Supp. 762, 782 n. 30, 786 (E.D.N.Y. 1980). To the extent that petitioners' argument is based upon a possible time bar, there are two difficulties. First, it is surely premature, since the District Court has not yet ruled on the statutes of limitations defenses. Second, it ignores the possibility that the District Court, in manufacturing federal common law, might choose the narrower statute of limitations, thus barring an equal or greater number of claims.

Essentially, petitioners seek review of the Court of Appeals decision primarily because of the litigation's social significance. Precedents in this Court, however, show that the legal precepts governing the issues raised in the petition are clear and unexceptional. Thus, Justice Holmes's caution that "Great cases like hard cases make bad law," *Northern Securities Co.* v. *United States,* 193 U.S. 197, 400-01 (1904) (Holmes, J., dissenting), is only partially applicable to this case: this may be a great case, but the law is well established.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: May 28, 1981

Respectfully submitted,

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APPENDIX

Respondents' Statement Pursuant to Supreme Court Rule 28.1

Diamond Shamrock Corporation:

A.L.A. Chemicals Limited
Agil-Agroquimica Industrial Ltda.
Amalgamated Curacao Patents Company N.V.
Ancom Sdn. Berhad
Anglonor Limited
Anglonor S.A.
Arkwright Chemicals Limited
Carbocloro S.A. Industrias Quimicas
Chemby Chemicals Limited
DSAG Corporation
Dacral, S.A.
Dia Prosim GmbH
Diamond Shamrock (Africa) (Pty) Ltd.
Diamond Shamrock Alberta Gas Ltd.
Diamond Shamrock Hansen A.p.S.
Diamond Shamrock (India) Ltd.
Diamond Shamrock Italia S.p.A.
Diamond Shamrock Polychem AB
Diamond Shamrock Scandinavia AB
Diamond Shamrock Scandinavia A/S
Diamond Shamrock Scandinavia OY
Diamond Shamrock Trading Corporation
Diaspa S.p.A.
Herbitecnica Defensivos Agricolas Ltda.
Inmuebles Industriales del Pacifico, S.A. de C.V.
Insecticidas del Pacifico, S.A. de C.V.
Insulating Aggregates, Inc.
Korea Potassium Chemical Co., Ltd.
Lankro Italiana S.p.A.
MDS Corporation
Muenzing Chemie GmbH
Neopur Limited

Neopur Technologien GmbH
Nippon Dacro Shamrock Co., Ltd.
Nopco Argentina S.A.I.C. y F.
Nopco Colombiana S.A.
Nopco Industrial S.A. de C.V.
Parel Limited
Parel S.A.
San Nopco Limited
Semilera del Noroeste S.A. de C.V.
Showa Diamond Chemical K.K.
Sigmor Corporation
Sirotherm, Inc.
Thai Diamond Shamrock Co., Ltd.

Monsanto Company:

ACM Services, Inc.
Cole Chemicals Limited
Cole Electronics Limited
Cole Equipment Limited
Cole Plastics Limited
Cole Polymers Limited
Collagen Corporation
Companhia Brasileira de Estireno (CBE)
Companhia Brasileira de Plasticos Monsanto
Daishin Kogyo K.K.
Expanded Polystyrene Technology Limited
Fisher Controls A.G.
Fisher Controls, B.V.
Fisher Controls Company, Inc.
Fisher Controls Company of Canada Limited
Fisher Controls Ges. mbH
Fisher Controls G.m.b.H.
Fisher Controls International, Inc.
Fisher Controls Limited
Fisher Controls PTE LTD
Fisher Controls Pty Limited
Fisher Controls, S.A.
Fisher Controls, S.A.N.V.

Fisher Controls, S.p.a.
Fisher Controls Trading Company
Fisher Controls Trustees, Ltd.
Fisher Governor de Mexico, S.A.
Fisher Service Company
Goyana, S.A. Industrias Brasileiras de Materias Plasticas (GOYANA)
Hydrocarbon Products Pty Ltd.
Industrias Resistol, S.A. (IRSA)
Innoven Capital Corporation
K.K. Astro-Gelande
Kibi Kasei K.K.
Korag Company Limited
Milwaukee Die Casting Co., Inc.
Mitsubishi Monsanto Chemical Company (MMK)
Monsanto Agricola de Espana S.A. (MADESA)
Monsanto Chemicals of India Limited (MCIL)
Monsanto (Malaysia) Sdn. Berhad (MONAYSIA)
Nippon Cooper Kabushiki Kaisha
Nippon Fisher Company, Ltd.
Plagon S.A.—Plasticos Goyana Do Nordeste
Plastic Products Limited
Polyamide Intermediates Limited
Resinor Sinteticos do Nordeste S.A.
Revertex Industries (N.E.) Ltd.
Revinex Australia Limited
R. H. Cole Limited
R. H. Cole Investments Limited
Ryonichi Nohken K.K.
Snakyo Kasei Sangyo K.K.
Soperton Gum Market, Inc.
Sunvic Regler G.m.b.H.
Taiyo Kogyo Kabushiki Kaisha
102975 Canada Limited
Vencel Resil Ltd.

Thompson-Hayward Chemical Company:

North American Philips Corporation
American Color and Chemical Corp.

Hercules Incorporated:

Adria Laboratories Incorporated
Adriamycin Partnership
Agroquisa S.A.
Abieta Chemie G.m.b.H.
Australian Chemical Holdings Limited
Boots Hercules Agrochemicals Co.
Companhia Brasileria de Produtos Quimicos Bononia
Custom Oil Recovery Technology Co.
Dawood Hercules Chemicals Limited
DIC—Hercules Chemicals Inc.
Genu Products Philippines Inc.
Hercofina
Hercofina Europe
Hercules Magnetics Limited
Hercules De Centroamerica S.A.
Herdillia Chemicals, Ltd.
Hercor Chemical Corporation
The Holden Vale Manufacturing Company Limited
HTL Biospecialties Ltd.
Indian Gum Industries Ltd.
Inmobiliaria Petrocel S.A. de C.V.
Lextar
Lextar V.O.F.
Nelsons Acetate Limited
Neofil S.p.A.
Pakistan Gum Industries, Ltd.
Petrocel S.A.
PPH—Companhia Industrial de Polipropileno
Polo—Filme Industria E Comercio Ltda.
Quimproc S.A.
Rika—Hercules K.K.
St. Croix Petrochemical Corp.
Sumika—Hercules Co. Ltd.
Taiwan Polypropylene Co. Ltd.
Taloquimia, S.A.
Teijin Hercules Chemical Company Limited
Texas Alkyls, Inc.